No. 12873.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

Appellee adopts the statement of jurisdiction contained in Appellant's Opening Brief, pages 1 and 2.

STATEMENT OF THE CASE.

INTRODUCTORY.

By this action, commenced September 22, 1949, appellee Sanger sought a mandatory injunction compelling his reinstatement in the employ of the appellant, the Plomb Tool Company, a corporation, hereinafter referred to as Plomb, and for incidental damages sustained from loss of wages, commissions and benefits due to Plomb's denial of Sanger's application for reinstatement made within 90 days after Sanger was relieved, in December, 1945, from services in the naval forces of the United States.

The trial court ordered Plomb to reinstate Sanger as its sales manager in the Kansas City territory [R. 20] and found that Sanger was entitled to recover $79,475.05 as damages from Plomb with 7% interest from January 1, 1947, less tax withholding and other deductions required by law [R. 18].

THE FACTS.

1. Sanger Joins the Plomb Sales Force in 1932.

In 1932 at the National Automobile Parts Show in Chicago, the appellee Sanger met James Durham, Plomb Tool representative for the mid-west territory. Durham told Sanger that he wanted to dispose of part of the mid-west territory and that there were no customers at that time in Kansas, Iowa, Nebraska and Missouri. Durham introduced Sanger to E. D. Moore, then sales manager for appellant Plomb. Moore told Sanger that he would hire him and that he would see if he could obtain some financial assistance in the way of other lines because the Plomb Tool Company was not in a position to incur the expense of new salesmen [R. 29-31, 164].

2. Plomb Arranges for "Other Lines" to Help Carry Sanger.

Moore made an arrangement whereby Sanger would get the Wohlert line and a few other small lines to carry him [R. 31].

In 1933 Sanger received $341.42 from Plomb, $2,510.69 from the Wohlert Corporation, $369.93 from New England Auto Products and $53.87 from Liberty Accessories. The latter three concerns are manufacturers of automotive parts, not tools [R. 33].

This arrangement was in line with industry practice. Morris Pendleton, president of appellant Plomb Tool Company, testified at the trial as follows:

> "When companies are small and their customers are limited and their sales volume is small, it is very common in the tool business of various sorts for sales to come through manufacturers' agents; and, as a matter of neighborliness, if several companies have a territory in which they want representation, for them to jointly use the same person to represent them." [R. 164.]

3. From 1932, Until He Entered the Navy, Sanger's Relationship With Plomb Is Unchanged.

From 1932 to November 1942, Sanger sold Plomb merchandise on a commission basis in the following territory: Kansas, Iowa, Minnesota, Missouri, Nebraska (east of extension of the Colorado eastern boundary), South Dakota (Brown, Beadle, Sanborn and Bonhomme Counties only), and the city of Rock Island, Illinois [Finding III, R. 12]. He brought in every account in the territory except one and built up his sales volume every year [Ex. 31, R. 65].

Until 1938, Sanger never had any written contract with Plomb [R. 39]. In the 1938 contract [Ex. 7] he was denominated a "salesman"; in the 1939 contract [Ex. 8], he was a "representative"; and in 1942 he was described to the United States Government by Mr. Pendleton as having been "district manager for Plomb Tool Company" for many years [Ex. 22, R. 52, 180]. On December 11, 1942, the chairman of the Board of Directors of Plomb also informed the government that Sanger "had been employed" by Plomb for over ten years [Ex. 24, R. 55].

Plomb's relationship with Sanger before he went to war was summarized at the trial as follows:

> "The Court: There was no change in the arrangement, so far as you know, from the time he first came into the company until he went into the service?
> Mr. Pendleton: No." [R. 166.]

Mr. Pendleton was shown Exhibit 7 (the 1938 "salesman" contract) and Exhibit 8 (the 1939 "representative" contract) and he said:

> "The use of 'salesman' in one case and 'representative' in the other case is purely a choice of words, and did not in any way alter the relationship between the company and Mr. Sanger." [R. 167.]

In 1939 and in subsequent years Plomb consistently referred to Sanger's status as being that of a salesman [Exs. 2, 3, 4, 5, 6, R. 36-37].

In December, 1939, Plomb paid Sanger's expenses to attend a sales meeting in Los Angeles [R. 44]. On February 20, 1940, the vice-president of Plomb told Sanger that he was a "very 'top string' salesman" [Ex. 12, R. 45].

On April 8, 1940, at a "Family Day Party," Plomb conducted a presentation of service pins to Plomb Tool "employees" and Sanger received one of these service pins [Ex. 13, R. 46, 184].

On April 10, 1940, Plomb sent Sanger a list of new jobbers in his territory in a letter addressed to all "salesmen" [Ex. 14, R. 46].

Shortly prior to September 9, 1942, Plomb deducted money from Sanger's commissions and used it for a donation to a clubhouse built for the employees of Plomb. A letter from the president of the Plomb Employees' Asso-

ciation dated September 9, 1942, stated that Sanger's name was going to be on a plaque at the clubhouse [Ex. 17, R. 49, 183].

4. Sanger Performed a Multiplicity of Tasks for Plomb.

Sanger always kept on the road; he never had a desk since 1932. He merely used a mail forwarding service from the warehouse where the Plomb Tool stock was carried [R. 79]. Sanger never paid for an office in his life. All he had was mail forwarding; he never had a chair, desk, or anything like an office [R. 82, 102].

Sanger made suggestions to the company to improve their sales [R. 84]. He assisted the designing of many special tools [Ex. 22, R. 181].

Plomb furnished Sanger stationery with its name on it [R. 85].

Plomb requested Sanger to make reports to it concerning his itinerary and costs. From time to time Plomb furnished Sanger names of prospective customers in his territory and Sanger reported to Plomb regarding them. Plomb requested Sanger to report on his activities in collecting past due accounts [Ex. 50; App. Br. VI-E, 4].

Sanger's duties even included repair and maintenance work. He testified as follows:

> "It was up to me as a salesman to keep that board in repair and clean. In other words, about once or twice a year, depending on the dust storms we had, all the tools would have to come down, those boards be washed and wiped off, sometimes revarnished and new brackets for new numbers of tools that were manufactured be installed on those boards." [R. 102].

Sanger did this work and was furnished a complete tool kit with varnish and paint and brackets by Plomb Tool Company. He was given another kit to repair broken tools that the jobbers would give him on regular calls [R. 102].

5. On January 1, 1942, Plomb Converted to a Direct Sales Program but Expressly Left Unchanged the Status of Sanger and Two Others.

Plomb's original practice of using salesmen with multiple lines [described in paragraph 2, *supra*] ceased on January 1, 1942 [R. 161, 168].

This decision expressly exempted three salesmen from its scope: Neil Jones, of North Carolina (ultimately fired in 1944); Jack Schrenker, of Pittsburgh, and Sanger [R. 171]. These three were permitted to follow the old practice of selling other lines.

Mr. Pendleton testified that the decision to make this change was reached in the fall of 1941 [R. 168]. There is simply no support in the record for appellant's statement in its opening brief (p. 55) that Sanger was excepted from the new selling policy because Plomb "knew he would shortly leave for service in the armed forces and did not wish to impose upon him the inconvenience entailed in such a change-over."

If this were true it would constitute the only display of consideration by Plomb for Sanger in the entire record.

However, it was not true. The decision to change was reached even before Pearl Harbor. The real explanation lies in the figures of Sanger's earnings. By 1941, the plan of carrying him in the new mid-west territory by permitting him to sell other lines was only beginning to show

results. Up to that year the other lines had produced more commissions than the Plomb line [R. 98].

Sanger's exception (and probably Schrenker's too) only resulted from the fact that Plomb would have lost a good salesman if it had insisted upon his surrendering half of his income when the development of Plomb's volume in the mid-west territory was still in its embryonic stage.

6. In November, 1942, Sanger Joins the Navy.

Sanger went into the Navy in November, 1942 [Finding IV, R. 13]. He was the only Plomb salesman to go to war [R. 193].

Sanger reminded Plomb on November 19, 1942, that it was planned, although not definitely decided that he would be paid a year's commission after he went into the service [Ex. 23, R. 53].

Plomb did not confirm this agreement but on December 24, 1942, Plomb wrote Sanger that they would like to have his picture for their house organ and said that Sanger was to get one-half of his commission for a period of three months [Ex. 25, R. 55].

Sanger's other lines paid him full commissions all of the time he was at war [Ex. 1, R. 68]. The record is silent as to whether they asked for his picture. However, letters written to Plomb while Sanger was in the service were published in the latter's house organ [Ex. 26, R. 55] and Plomb wrote Sanger again on December 31, 1942, asking for a picture of him in his uniform to be printed in their house organ [Ex. 27, R. 56].

7. In 1943-1945, Plomb Enjoys a Great Wartime Prosperity.

During the war Plomb had a phenomenal growth, increasing its annual volume from $1,000,000 to $14,000,000 [R. 145].

The Kansas City territory contributed more than its proportionate share to the increase in the company's volume during the war [R. 158].

8. In May, 1945, Sanger Starts His Postwar Planning, but Meets With a Cold Reception.

On May 15, 1945, Sanger wrote Plomb to inquire about the possibility of his postwar reemployment [R. 58]. Plomb took over two months to reply to this letter and then only replied after a personal reminder that a reply was due. This reply, dated July 20, 1945 [Ex. 28, R. 57] contained the following paragraph:

> "Without knowing when you will be out of the service it is difficult to talk of possibilities of your again representing Plomb. As you know, the men who have taken over the territories formerly covered are direct employees of Plomb. *As a matter of fact we have only one manufacturer's agent left in our entire picture, and that is Jack Schrenker* in Pittsburg who has two men working with him, his brother and another chap who is devoting most of his time to Plomb. In general I would say that our experience has been such that we will probably never go back to the old method."

The writer of this letter, Mr. R. W. Kerr, vice-president and sales manager of Plomb, had been advised [R. 142] that it was the company's position that Sanger was not entitled to any reinstatement rights as a veteran [R. 152; App. Op. Br. 7].

However, when he wrote the above letter, Exhibit 28, to Sanger while he was in the service, Mr. Kerr did not then tell him that the company had taken this position in respect to him.

"I had no occasion to," Mr. Kerr explained at the trial [R. 155].

9. Plomb "Welcomes" Sanger to Civilian Life.

Sanger's terminal leave from the United States Navy expired December 29, 1945 [Finding V, R. 13].

He came to Los Angeles and saw Mr. Kerr. Kerr told Sanger that there was an efficiency organization from the east working directly with Mr. Pendleton, president of Plomb, and that this organization had recommended that all Plomb representatives carry only one line [R. 61, 130].

Mr. Pendleton joined the conversation and when the matter was brought up of Sanger's continuing to represent other firms with other lines, Pendleton said, "Well, we are certainly going to have to make some exception for you, Lionel." [R. 61.]

Sanger told Mr. Kerr that he would drop the other lines if he were given time to give the other firms some notice, "because these firms had paid me while I was in the service and Plomb had not." [R. 62, 132.] Otherwise, Sanger was willing to work for Plomb exclusively and in any territory where the company wanted him to work [R. 105].

Mr. Kerr said to Sanger: "Well, just drop them a note and tell that you have got something better, and that is all there is to it." To this Sanger replied, "I just couldn't do a thing like that. I was bound loyally to them. They were square with me for four years away, pretty near

four years, and I didn't feel that that was right." [R. 62].

The following day Kerr told Sanger that they were going to send for Mr. Freund (in charge of the Kansas City territory during the war) and that Sanger was to just stand by and call in every day. Mr. Kerr told Sanger that before any proposition to him could be made firm, which would involve a change in Mr. Freund's status, a discussion would have to take place with Mr. Freund [R. 129]. Sanger did call in every day and after about the seventh or eighth day he could not contact either Mr. Pendleton or Mr. Kerr and was informed that Mr. Pendleton had gone east without seeing him again [R. 215]. He finally reached Mr. Kerr around January 18th and was then told to return to Kansas City and keep in touch with them [R. 63].

On January 27, 1946, from Kansas City, Sanger wrote Mr. Kerr a letter [Ex. 29, R. 64] stating that he was "looking forward to hearing from you, so that I can again represent the Plomb Tool Company."

On January 31st Mr. Kerr replied to Sanger [Ex. 30] saying, "Sorry not to have had more time to visit with you while you were here, but you know the pressure under which we have been operating."

On February 10, 1946, Sanger replied with another letter to Mr. Kerr [Ex. 31, R. 65]. This letter is a recapitulation of Sanger's relations with Plomb, how he brought in every account in the midwestern territory and built up his volume of sales every year until he went into the Navy. In it he stated the following:

> "My loyalty will not allow me to leave the other firms that I represent at this time to go with Plomb

exclusively. *I am going to give them representation at least until the first of the year."*

Further, he stated:

"I opened every account in the territory except Osiek, I serviced these accounts for a period of eleven years, my volume increased yearly. I was the only Plomb Tool representative to volunteer my services to my country, *my welcome back lies in your hands.* My other firms paid me throughout the war and one, as you know, gave me a check for $1000 upon my return. I will wait in Kansas City for a return reply to this letter from you and I trust that same will be favorable."

Mr. Kerr came to Kansas City in March and had lunch with Sanger. He told Sanger that "Mr. Pendleton was still of the same opinion, that he was going to listen to this eastern research firm, and that there was nothing he could do but he would definitely let me hear from him and I would hear from either he or Morris Pendleton when he got back to California. I waited for that and never heard." [R. 66.]

10. Terms of Reinstatement Offer.

In his opinion, Judge Mathes said the offer made Sanger upon his return was not an offer of reinstatement and was not intended as such.

"In my view it falls short of being an offer of reinstatement to a position of like seniority, status and pay, (1) by reason of the indefiniteness of the commission rate, and (2) by reason of the fact that although one other salesman who had not entered the service was being permitted to handle other lines in another territory, that privilege which this plaintiff had enjoyed prior to the time he entered the service was to be denied him in the offer made." [R. 221.]

A. Indefiniteness of Commission Rate.

The offer was indefinite primarily because no definite compensation to Sanger could possibly be spelled out of Plomb's proposal to him.

As part of its offer, the company required "that two other salesmen be employed by the company to assist him (Sanger) in covering the territory and be compensated out of the commissions earned on sales in the territory." [App. Op. Br. 60-61; R. 124, 187.]

When questioned as to Plomb's practice in dividing commissions between salesmen, Joseph G. Leach, sales supervisor, testified:

> "As Mr. Pendleton has testified, those rates varied between zones and at times, even down to men." [R. 205.]

The Court's own questioning of two witnesses established the indefiniteness of the offer:

> "The Court: Did you discuss with him who was to pay these men?
>
> Mr. Kerr: Well, in explaining the new program I undoubtedly explained how it was worked, which was done in all territories, your Honor, and that was, the earnings were pooled, then a division was made according to agreement between the district manager and the men and the company.
>
> The Court: In other words, the territory yielded certain business.
>
> Mr. Kerr: That is correct.
>
> The Court: And certain commissions followed from that business?
>
> Mr. Kerr: That is correct." [R. 155.]

"The Court: Who would determine how this 100 per cent of commissions was divided? Would the company be the final arbiter in the matter? * * * Suppose Mr. Sanger had accepted this proposition and he picked two highly compatible men and he said: 'Well, now, gentlemen, I want 70 per cent, not 7½. I will give each one of you 15 per cent.' Both of them would have said no, they would not do that. Who is going to decide that dispute?

Mr. Pendleton: That would be a possible situation. The company then enters the proposition. The two men that were offered 15 per cent would say, 'No; we can't make it on that small a cut.' Then there would be no employees because they would not take the job." [R. 190.]

"The Court: Would it be accurate to say that the ultimate authority in determining the amounts or proportion of this seven and one-half per cent which Mr. Sanger would receive would be the company?

Mr. Pendleton: In the final analysis, if there were an impasse, the company would have to determine that division." [R. 189-192.]

B. Throughout All of 1946 Plomb Continued Permitting a Stay-at-Home Salesman to Handle Other Lines.

In January, 1946, all of the sales representatives of the company were on an employee full-time basis except Jack Schrenker in the Pittsburgh area. Mr. Kerr said, "I had been putting the pressure on him at that time to change over and, as a matter of fact, told him that it would have to be done very shortly." Schrenker had two small tool lines related to what Plomb had [R. 136], but Sanger never sold any tools that were competitive to Plomb [R. 105].

Schrenker was not in service [R. 137].

Mr. Kerr stated that the following passage contained in Exhibit 35 was substantially correct:

> "They stated that Schrenker was permitted to continue *on the old basis* at his request, but that at the end of his present contract, which will coincide with the end of this year, he will be required to comply with the present policies and rules, or he will not be allowed to handle the line." [R. 140.]

Mr. Schrenker was permitted to carry other lines to the end of 1946 and Mr. Kerr admitted that this was the identical period which Sanger had requested to do the same [R. 140, 141].

C. Territorial Area Is Reduced.

The Kansas City territory that was offered Sanger after the war excluded a part of the Dakotas and Minnesota [R. 153, 186]. That this area was "whittled off" is conceded (App. Op. Br. 71).

However, before the war, Sanger had brought in the first Iron Stores account in Minnesota [R. 147]. The Iron Stores account ultimately became a big one [R. 148].

There was some testimony concerning an alternative offer involving the Chicago territory [R. 186]. However, Sanger denied that either Mr. Kerr or Mr. Pendleton told him he could have the Chicago territory, plus his old line. He said such an offer would be ridiculous because of its unworkability [R. 215]. Mr. Kerr also said that Sanger's refusal of the Chicago territory offer was based upon its

unfeasibility [R. 144]. In any case, Chicago was not comparable in sales volume to Kansas City. In his last pre-war year, 1942, Sanger produced 5.2% of Plomb's gross business out of the Kansas City area and even in 1946, the Chicago area only produced 4.2% [R. 195].

11. 1946 Earnings for Plomb Reach a New High.

In 1946, Plomb began to reap the post-war harvest that Sanger and millions of other veterans had made possible by their sacrifices.

1946 was the highest year's volume that Plomb ever had in the Kansas City territory [R. 176, 183]. In that banner year, tool manufacturers did not need salesmen, they only needed order-takers.

1946 was the year Plomb was selling tools to government GI schools then opening up for the purpose of training veterans [R. 183].

Another part of the additional volume came from jobbers who were replenishing their stocks that had been depleted during the three preceding war years [R. 183], but these orders all came to Plomb from accounts originally established by Sanger [Ex. 31].

These two factors, among others, account for the fact that the Plomb income in Kansas City jumped from $136,000 in 1942 [R. 175] to $737,000 in 1946, and dropped back to $295,000 by 1949 [R. 183]. However, Mr. Pendleton attempted to explain this drop in sales [R. 196] by saying that in 1949 the company spent most of the year recovering from the adverse effects of litigation with respect to a trademark.

In the record there is some testimony concerning some subsidiary lines developed by Plomb. However, Mr. Kerr

admitted that the Challenger line made by Penens, one of the subsidiaries, was not developed until the summer of 1946 and that the J. P. Danielson merger did not occur until late in 1946 or 1947, after Plomb was through dealing with Sanger [R. 160].

The real postwar growth in volume in 1946 was in the tool business, and not in Sanger's other lines. In 1941 and 1942, before Sanger left Plomb's employ to enter the U. S. Navy, $20,244.49, or 43.7% of his income was derived from his other lines [Pretrial Stipulation; Ex. 50, Par. 6-C, Appendix, App. Op. Br. 3].

In 1946 Sanger's gross commissions from his other lines only increased to $25,968.00 [R. 99], or only 24.8% of his total gross income if there be added thereto his putative 1946 gross earnings of $79,475.05 from Plomb, as awarded him by the judgment [R. 16].

Nevertheless, the trial court in its judgment refused to award Sanger anything for his loss of the Plomb commissions earned in his territory in the years 1947, 1948, 1949 and 1950, and even required Sanger to credit Plomb with $34,043.45 to pay the 1946 commissions to the additional salesmen which Plomb had installed in his old territory during the war [R. 16].

Although there was testimony to the contrary, Sanger maintained that carrying other lines in addition to Plomb's tool line required no additional men or manpower, Sanger said that the determining factor was the distance between towns in the territory.

> "I had carried the Plomb Tool Company line along with the parts lines since 1931, and I believe I showed an increase practically every year on the Plomb Tool Company. When I started there they had no customers, and in most cases after calling on one cus-

tomer in the morning, at the best, and another one in the afternoon, when you once get away from the larger cities like St. Louis, Kansas City, Omaha, time doesn't mean much because there is too much distance involved to make the next town. So therefore that time is used and there is actually no further effort required than to sell more than one line.

Q. In other words, as you go into a small town you have got to devote that whole day to that town, anyway; you have gone that far and that time is spent in offering all the lines that you have? A. Yes, sir" [R. 218].

After the war, Sanger was never able to re-establish himself as a tool salesman. He testified:

"I tried to sell other tools since I was not re-employed, but it is pretty hard to do when I spent practically my whole life building Plomb. I go around and just can't seem to sell the others. * * * I just don't seem to be able * * * to show reason enough why they should discontinue Plomb, because I was sold on Plomb myself and I still think it is the best tool manufactured" [R. 104].

12. Sanger Seeks to Establish His Claim for Reinstatement Under the Selective Service Law.

In March, 1946, Sanger took up his claim for reinstatement with the Selective Service System and the United States Attorney in Chicago, Illinois [Findings VII, VIII, and IX; R. 14].

Sanger wrote from Chicago to Lieut. Col. Kenneth H. Leitch, Director of Selective Service for California, on June 7, 1946, saying:

"In view of the fact that my employer, the Plomb Tool Company, is licensed to do business in Illinois

and has its registered agent, the C. T. Corporation System at 206 S. La Salle Street, Chicago, Illinois, the local D. A. here has informed me that the suit can be filed here rather than in California" [Ex. 34].

However, the United States Attorney in Chicago did not file suit for Sanger against Plomb, and in February, 1948, turned the file over to Sanger who, in the same month, gave the matter to Arvey, Hodes and Mantynband, a Chicago legal firm [Findings IX and X; R. 14].

The Arvey firm in Chicago first wrote to Plomb's lawyers in Los Angeles, O'Melveny and Myers, on February 28, 1948 [Ex. 38].

On March 3, 1948, Plomb's lawyers merely acknowledged receipt of this letter and promised Arvey that they would be further advised [Ex. 39].

Approximately two months went by and then on April 26, 1948, Plomb's lawyers wrote to Arvey that the executives of Plomb had been so busy with the problems of reorganization that full and proper consideration had not yet been given to Arvey's letter of February 26th [Ex. 40].

May and June then went by and on July 1st Arvey wrote the O'Melveny firm again, requesting a final determination by Plomb one way or the other [Ex. 41].

The months of July and August and most of September then elapsed and finally on September 23rd, Arvey wrote another follow-up letter to O'Melveny's firm requesting a decision [Ex. 42].

On September 27th the O'Melveny firm wrote to inform Arvey that a reply would be forthcoming by mid-October [Ex. 43].

Most of October came and went without a further reply from O'Melveny's firm and finally on October 26th Arvey wrote again requesting a reply [Ex. 45].

It was only on November 4, 1948, that Arvey was able to get a definite reply from Plomb's lawyers [Ex. 46] rejecting Sanger's claim to reinstatement [Finding XI, R. 14].

The Chicago lawyers brought suits for Sanger in the United States District Court for the Northern District of Illinois on July 22, 1949 [Finding XII, R. 15].

Plomb's license to do business in the State of Illinois was revoked by the Secretary of State of Illinois on July 1, 1949, and its registered agent resigned on August 4, 1949, five days before service was made on said agent, to-wit, on August 9, 1949 [Sanger's affidavit of April 8, 1950, filed with Exs. 33 to 47, R. 70].

As a result, Sanger's action in Illinois was dismissed without prejudice on September 20, 1949, and this present action was brought by him against Plomb in the United States District Court, Southern District of California, Central Division, on September 22, 1949 [Findings XII and XIII, R. 15].

The trial court expressly found that Sanger was not guilty of laches by reason of his failure to commence this particular action sooner than he did. The trial court also found that the delay in filing this suit was contributed to by Plomb, and that Plomb suffered no prejudice by reason of delay [Finding XIV, R. 15]. A written opinion on this point was filed by the trial court on May 17, 1950, in denying defendant's motion for summary judgment.

13. The District Court Upholds Congress' Promise to the Veteran.

On January 9, 1951, in his oral opinion, Judge Mathes said:

> "I find that what had been *promised by the law* to the plaintiff was a commission on all sales of the Plomb Tool Company in the Kansas City territory as constituted prior to the entry of the plaintiff into the service, at the commission rate then paid him plus what he would have earned and did earn by handling of other lines as was his practice at the time he entered the service, less his expenses which he customarily paid prior to entering the service" [R. 222].

Summary of Argument.

A. APPELLEE'S ACTION WAS ONE OF EXCLUSIVELY EQUITABLE COGNIZANCE, BROUGHT TO ENFORCE A FEDERALLY-CREATED RIGHT, AND THEREFORE COULD NOT BE BARRED BY A STATE STATUTE OF LIMITATIONS.

1. THE ACTION WAS OF EXCLUSIVELY EQUITABLE COGNIZANCE.

2, ACTIONS FOR DAMAGES ONLY, MUST BE DISTINGUISHED.

B. APPELLEE'S CLAIM WAS NOT BARRED BY LACHES AND THE DELAY IN FILING SUIT WAS CONTRIBUTED TO BY APPELLANT, WHO SUFFERED NO PREJUDICE.

1. THE ACT ITSELF ENCOURAGES DELAY FOR NEGOTIATIONS AND SUCH DELAYS ARE THEREFORE NOT UNREASONABLE.

2. THERE BEING NO STATE CAUSE OF ACTION FOR REINSTATEMENT AGAINST A PRIVATE EMPLOYER, ONLY ONLY FEDERAL EQUITABLE PRINCIPLES OF LACHES APPLY AND NO STATE LIMITATIONS CAN BE TAKEN INTO CONSIDERATION.

C. THE FINDING THAT APPELLEE LEFT A POSITION IN THE EMPLOY OF THE APPELLANT WAS ABUNDANTLY SUPPORTED BY THE EVIDENCE AND WAS REQUIRED BY A CONSTRUCTION OF THE ACT TO EFFECTUATE ITS REMEDIAL PURPOSE.

1. THE ACT WAS NEVER INTENDED ONLY TO PROTECT VETERANS ON REGULAR PAYROLLS.

2. THE "MISCHIEF-REMEDY" RULE SHOULD BE APPLIED TO CONSTRUCTION OF THE SELECTIVE SERVICE ACT.

3. THE FINDING THAT SANGER WAS NOT AN INDEPENDENT CONTRACTOR WAS ABUNDANTLY SUPPORTED BY THE EVIDENCE AND SHOULD BE UPHELD UNDER 52A OF F. R. C. P.

D. THERE WAS NO CHANGE IN APPELLANT'S CIRCUMSTANCES AND NO OFFER WAS EVER MADE APPELLEE OF A POSITION OF LIKE SENIORITY, STATUS AND PAY.

1. PLOMB'S POST-WAR PROFITS WERE NOT A LAWFUL "CHANGE OF CIRCUMSTANCE."

2. THE OFFER OF A CHANGED TERRITORY WAS NOT COMPARABLE TO SANGER'S PRE-WAR TERRITORY.

E. FAILURE TO RESTORE THE VETERAN IS A CONTINUING VIOLATION FOR WHICH THE PROPER REMEDY IS RESTORATION, WITH DAMAGES RUNNING, WITHOUT LIMITATION, UP TO THE TIME OF RESTORATION.

1. RIGHT TO COMPENSATION RUNS FROM DATE OF APPLICATION FOR REEMPLOYMENT.

2. THE DAMAGES AWARDED APPELLEE FALL FAR SHORT OF THE MAXIMUM THAT COULD HAVE BEEN AWARDED.

F. FINDINGS OF FACT SHOULD NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

ARGUMENT.

A. Appellee's Action Was One of Exclusively Equitable Cognizance, Brought to Enforce a Federally-Created Right, and Therefore Could Not Be Barred by a State Statute of Limitations.

The questions which the appellant has raised here under Point A of its opening brief (pp. 23-31) were raised in the trial court upon a summary judgment motion and were disposed of in appellee's favor by Judge Mathes in an opinion, rendered May 16, 1950, holding:

> "(1) That by this action, commenced September 22, 1949, plaintiff seeks a mandatory injunction compelling plaintiff's reinstatement in the employ of the defendant, and incidental damages allegedly sustained from 'loss of wages, commissions and benefits' due to defendant's denial of plaintiff's application for reinstatement, alleged to have been made within ninety (90) days after plaintiff was relieved, in December, 1945, from . . . service in the naval forces of the United States;
>
> "(2) That plaintiff's action is brought 'under Section 7 of the Service Extension Act of 1941 (55 Stat. 628, 50 U. S. C. App. Sec. 357) and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U. S. C. App. Sec. 308), as amended,' and invokes the equity jurisdiction of this court pursuant to Section 8(e) of the latter Act (See *Oakley v. L. & N. R. R.,* 338 U. S. 278 (1949); *Fishgold v. Sullivan Dry Dock,* 328 U. S. 275 (1946); *Flynn v. Ward Leonard Electric Co.,* 84 F. Supp. 399, 400 (S. D. N. Y. 1949); *Strelitz v. Surrey Classics, Inc.,* 7 F. R. D. 101, 103 (S. D. N. Y. 1946); *Kay v. General Cable Corp.,* 63 F. Supp. 791 (D. N. J. 1946).)"

(1) The Action Was of Exclusively Equitable Cognizance.

Appellee respectfully submits that proceedings seeking an order of restoration to a position in private employment are not only to enforce an equitable right but are of exclusively equitable cognizance. (Vol. 1, Pomeroy on Equity Jurisprudence, 5th Ed., 189-191, 226.)

> "Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the exclusive jurisdiction of equity, even though the primary right, estate, or interest of the party is one which courts of law recognize, and for the violation of which they give some remedy" (p. 189).

In such actions the award of damages is merely ancillary to the equity jurisdiction.

That the action is exclusively equitable is also demonstrated by the fact that the Selective Service Act envisaged benefits which cannot be supplied by an award of damages in lieu of restoration.

The act has a dual purpose, to enable the veteran to regain his lost skill by its actual use on the job and to provide a stabilized income during the period of readjustment. Hence an award of damages is an inadequate remedy if reinstatement is desired. (*Dacey v. Bethlehem Steel Co.,* 66 Fed. Supp. 161 (D. Mass. 1946); *Kay v. General Cable Corp.,* 59 Fed. Supp. 358 (D. N. J. 1945); *Hall v. Union Light, Heat & Power Co.,* 53 Fed. Supp. 817 (E. D. Ky. 1944); *Byrd v. North American Aviation, Inc.* (S. D. Calif. 1948, 15 C. C. H. Labor Cases 73,920).) The veterans are to have employment privileges that will assure them equal opportunity with those who stayed home

and bettered themselves in civilian jobs (*Droste v. Nash-Kelvinator Corp.*, 64 Fed. Supp. 716 (E. D. Mich 1946); *Kephart v. United States*, 74 Fed. Supp. 578 (C. Cls. 1947), motion for new trial refused, 75 Fed. Supp. 1020 (C. Cls. 1948).) Thus restoration in addition to damages was ordered even as to an elective position, since the veteran is entitled to the opportunity of being continued in employment beyond the year during which he may not be discharged without cause (*Sunker v. Local No. 621* (E. D. Tenn. 1949—unreported), and *cf. O'Connor v. Yardley Golf Club* (E. D. Pa. 1948), 16 Labor Cases 64,892, affirmed, 171 F. 2d 40 (C. A. 3, 1948), where an annual contract was involved).

The legislative history of the 1940 legislation indicated that the Congress inserted the provision against discharge without cause with a view not merely to the re-training involved but desiring that the veteran shall have "established himself in a permanent position." 86th Cong. Rec. 10346, remarks of Congressman Van Zandt; *idem* 10445, where Congressman O'Toole said that if reemployment lasted six months (the period for which he was then seeking to initiate protection) it would probably last indefinitely.

(2) Actions for Damages Only Must Be Distinguished.

Appellant attempts to escape from his reasoning by citing *Walsh v. Chicago Bridge & Iron Co.*, 90 Fed. Supp. 322 (App. Op. Br. 24). However, the veteran in the *Walsh* case only sued for damages and did not invoke equity by seeking reinstatement. The law is clear that an action for a solely equitable remedy involving a federally-created right is not controlled by a state statute of limitations. (See "Limitations and the Federal Court,"

Blume and George, 49 Mich. L. Rev. (May, 1951), 937, 949.) The controlling case is *Holmberg v. Armbrecht* (1946), 327 U. S. 392, from which the following quotation is taken at page 395:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created there is an end of the matter. The Congressional statute of limitations is definitive. See, *e. g.,* Herget v. Central Nat. Bank & T. Co., 324 U. S. 4, 89 L. ed. 656, 65 S. Ct. 505, 57 AM Bankr Rep (N. S.) 689. The rub comes when Congress is silent. Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. See Campbell v. Haverill, 155 U. S. 610, 39 L. ed. 280, 15 S. Ct. 217; Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 S. Ct. 65; Rawlings v. Ray, 312 U. S. 96, 85 L. ed. 605, 61 S. Ct. 473. The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. See Jackson County v. United States, 308 U. S. 343, 349-352, 84 L. ed. 313, 316-318, 60 S. Ct. 285.
>
> *"The present case concerns not only a federally created right but a federal right for which the sole remedy is in equity.** Wheeler v. Greene, 280 U. S.

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*Emphasis here, as well as elsewhere in this brief, is supplied unless otherwise noted.

49, 74 L. ed. 160, 50 S. Ct. 21; Christopher v. Brusselback, 302 U. S. 500, 82 L. ed. 388, 58 S. Ct. 350; Russell v. Todd, 309 U. S. 280, 285, 84 L. ed. 754, 758, 60 S. Ct. 527. And so we have the reverse of the situation in Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231, *supra*. We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

"Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See Russell v. Todd (*supra*) (309 U. S. at 289, 84 L. ed. 761, 60 S. Ct. 527). 'There must be conscience, good faith, and reasonable diligence to call into action the powers of the court.' McKnight v. Taylor, 1 How (U. S. 161, 168, 11 L. ed. 86, 88.) A federal court may not be bound by a State statute of limitation and yet that court may dismiss a suit where the plaintiffs' 'lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence. . . .' Benedict v. New York,

250 U. S. 321, 328, 63 L. ed. 1005, 1011, 39 S. Ct. 476. A suit in equity may fail though 'not barred by the act of limitations. . . .' McKnight v. Taylor, *supra;* Alsop v. Riker, 155 U. S. 448, 39 L. ed. 218, 15 S. Ct. 162.

"Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that *'laches* is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.' Galliher v. Cadwell, 145 U. S. 368, 373, 36 L. ed. 738, 740, 12 S. Ct. 873. See Southern P. Co. v. Bogert, 250 U. S. 483, 488, 489, 63 L. ed. 1099, 1106, 1107, 39 S. Ct. 533. *And so, a suit in equity may lie though a comparable cause of action at law would be barred.* If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time."

All of the cases cited by appellant on this point at Appellant's Opening Brief 26-29, *Campbell v. City of Haverhill,* 155 U. S. 610; *Abrams v. San Joaquin Cotton Oil Co.,* 46 Fed. Supp. 969; *Lorenzetti v. American Trust Co.,* 45 Fed. Supp. 128; *Chattanooga Foundry etc. v. Atlanta,* 203 U. S. 390; *Williamson v. Columbia Gas,* 110 F. 2d 15; *Barnes Coal Corp. v. Retail Merchants,* 43 Fed. Supp.

309, are actions for damages and therefore actions solely cognizable at law. Appellant might well have added two recent decisions of this Court, *Suckow v. Borax,* 185 F. 2d 196, and *Burnham v. Borax,* 170 F. 2d 569, to the same effect. However, all of these cases were *actions at law* for the enforcement of federally-created rights. No court has ever made these decisions in cases at law applicable to *actions in equity* for the enforcement of federally-created rights.

(3) The 1948 Amendment to 28 U. S. C., Sec. 1652 Did Not Change the Existing Law.

Anticipating that this Court would treat appellee's claim for reinstatement as a suit in equity (App. Op. Br. 27), appellant attempts to avoid the rule in *Holmberg v. Armbrecht, supra,* by seeking to breathe an unintended significance into the 1948 amendment to 28 U. S. C., Sec. 1652, which makes the Federal Rules of Decision Act apply to "civil actions."

However, the reviser's notes quoted by appellant (App. Op. Br. 28) clearly reveal that the amendment was merely intended to state the existing law. "Such act *has* been held to apply to suits in equity."

The past tense thus used by the reviser clearly refers to decisions like *Guaranty Trust Co. v. York* (1945), 326 U. S. 99, which established the definitive rule that independent of the Rules of Decision Act, in diversity cases either in law or in equity, the appropriate state statute of limitations was to be applied. Federal jurisdiction in Sanger's case was derived, however, from an Act of Congress, not diversity of citizenship.

B. Appellee's Claim Was Not Barred by Laches and the Delay in Filing Suit Was Contributed to by Appellant, Who Suffered No Prejudice.

The trial court's finding [XIV, R. 15] that Sanger was not guilty of laches and that the delay in filing suit was contributed to by Plomb, which suffered no prejudice, is amply supported by the evidence (See Statement of Facts, paragraph 12, p. 17, *supra*).

Appellant argues (App. Op. Br. 37) that it suffered prejudice because it had to pay out commissions to other salesmen that it had to hire when it refused to reinstate Sanger. But such losses were solely the product of appellant's stubbornness. Plomb has steadfastly refused to obey the Selective Service Act and (since the decree of reinstatement) the direction of the Court as well. It did this knowing that Sanger at all times was insisting, in a consistent and principled manner, that Plomb respect his rights under the law. Prejudice is the essential ingredient in laches and it is absolutely lacking in this case. Prejudice is, of course, a question of fact upon which the trial court's finding is controlling.

Thus, the Court said in *Watkins Motor Lines, Inc. v. De Galliford* (5 Cir., 1948), 167 P. 2d 274, 275:

> "* * * the veteran made every reasonable effort to secure re-employment amicably before filing suit, and should not be charged with undue delay in filing this action. The appellant itself was responsible for much of the delay."

And, in *Coon v. Liebmann Breweries* (D. N. J., 1949), 86 Fed. Supp. 333, 335, the Court said:

> "We are willing to concede that a veteran may be guilty of culpable delay tantamount to an abandonment of his rights, but it seems to us that where the charge is made *the burden is upon the employer* to prove the charge by clear and convincing evidence."

In a recent patent case, *Holland Co. v. American Steel Foundries* (N. D. Ill., 1950), 95 Fed. Supp. 273, 275, the Court said:

> "Further, I find that there is no merit to defendant's alleged defense of laches. There is ample evidence that plaintiff was in frequent communication with defendant concerning the asserted infringement from 1944—the year defendant made public its devices—until the present action was commenced in 1949. It seems clear that, during this entire period, plaintiff was *honestly endeavoring to effect an amicable settlement of the dispute and avoid litigation.* Certainly, such activity is not incompatible with proper diligence to protect one's patent interests."

The three cases in which appellant claims the veteran was penalized for laches (App. Op. Br. 33) are easily distinguished from the case at bar. In *Cummings v. Hubbell,* 76 Fed. Supp. 453, the veteran did not apply for reinstatement and was held to have waived his rights. In *Caldwell v. Harmon,* 12 Labor Cases 63,671, the veteran was a temporary employee who applied too late and changed circumstances were found to exist. In *Daniels v. Barfield,* 77 Fed. Supp. 283, the veteran had been discharged for cause.

(1) The Act Itself Encourages Delay for Negotiations and Such Delays Are Therefore Not Unreasonable.

The prelitigation routines suggested by the Selective Service Act take time. They imply recognition of the desirability of direct and indirect attempts to avoid litigation, to procure a durable continuance of the employment relation. (See subsection "e" of 50 U. S. C. App. 308.) Thus in Congressional debate, for instance, Congressman O'Toole (86 Congressional Record, p. 10445) said that if reemployment lasted six months, it would probably last indefinitely.

Congress strongly favors settlement rather than litigation. Thus the law now contemplates this procedure: An approach to the Bureau of Veterans' Reemployment Rights, which implies investigation, advice, negotiation and procuring opinions from the Secretary of Labor, *plus* a reference to the United States Attorney who also investigates and is legislatively encouraged to confer and negotiate, seeking settlement, before making the decision whether to litigate.

The Handbook of the Veterans' Assistance Program of the Selective Service System contains the following instructions:

> "203.23. Court Action Procedure. * * *
>
> (b) When assistance in obtaining reinstatement in a former position with a private employer has been sought from the Selective Service System by a veteran, *every possible effort to effect a mutually satisfactory settlement of the veterans' reemployment claim shall be exhausted before resort to court action is had.*"

(2) There Being No State Cause of Action for Reinstatement Against a Private Employer, Only Federal Equitable Principles of Laches Apply and No State Limitations Can Be Taken Into Consideration.

When courts apply the doctrine of laches to federally-created rights, equitable principles are the only proper considerations. The obligation of the courts is to prevent the use of state statutes of limitations as a "mechanical rule" to produce an inequitable result. (*Holmberg v. Armbrecht,* 327 U. S. 392, *supra.*) Only the traditional emphases of federal equity decisions are to be applied. State decisions on laches are not controlling in dealing with a federal right. Thus, even in dealing with state-created rights in *Guaranty Trust Co. v. York,* 326 U. S. 99, *supra,* Mr. Justice Rutledge in his dissenting opinion assumed the inapplicability of state decisions in saying:

> "The next step may well be to say that in applying the doctrine of laches a federal court must surrender its own judgment and attempt to find out what a state court sitting a block away would do with that notoriously amorphous doctrine."

In *Russell v. Todd* (1940), 309 U. S. 280, cited by appellant (App. Op. Br. 34), a bill in equity sought to enforce the liability of shareholders of a joint stock land bank. Under the statute, there was an equal and ratable liability for its debts. The court decided that the remedy for this case was exclusively in equity. Two state statutes existed. Under the first, the action was barred; under the second, which might have included

equitable proceedings, it was not barred. The lower court found that no laches existed, unless inferable from the first of the state statutes of limitations. The Supreme Court decided that in suits exclusively of equitable cognizance in the federal courts, the court without reference to the Rules of Decision Act will follow a state statute covering like causes. However, it will not adopt or apply as a substitute for or a supplement to its own doctrine of laches a state statute of limitations unless that statute applies to *like* causes of action in the state courts, *i. e.,* exclusively equitable causes of action. Since the first statute did not so apply and no other laches was found, the action could be maintained. The Court said:

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling." (P. 289.)

Judge Mathes, in his decision on denying appellant's motion for a summary judgment, pointed out that there was no state statute giving reinstatement rights *against private employers* and that therefore appellant's remedy for claimed delay would be confined to laches as applied by the Federal courts. The appropriate passages of the trial court's opinion follow:

> "(3) That while 'in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will . . . adopt and apply local statutes of limita-

tions which are applied to like causes of action by the state courts' (*Russell v. Todd,* 309 U. S. 280, 293 (1940); 28 U. S. C., Sec. 1652), there does not appear to be any remedy either equitable or legal, in like cases (*i. e.,* a statutory cause of action in favor of a former employee and against a private employer to compel reinstatement) under state law (*cf. Jones v. Board of Police Commissioners,* 141 Cal. 96, 74 Pac. 696 (1903); *Harby v. Board of Education,* 2 Cal. App. 418, 83 Pac. 1081 (1905);

"(4) That 'in the absence of any state statute barring the equitable remedy in like cases, the federal court . . . applies the doctrine of laches' (*Russell v. Todd, supra,* 309 U. S. at 289; *cf. Guaranty Trust Co. v. York,* 326 U. S. 99 (1945); and

"(5) That there are genuine issues as to certain material facts, including issues (a) as to whether or not plaintiff's delay in the commencement of this action was an unexcused delay, and if so (b) as to whether or not, if the suit is entertained, defendant will suffer prejudice by reason of the delay (see *Flynn v. Ward Leonard Electric Co., supra,* 84 F. Supp. 399, 401-402; *Cummings v. Hubbell,* 7 F. R. D. 360, 362 (W. D. Pa., 1947);

"It is now ordered that defendant's motion for summary judgment, filed February 9, 1950, be and is hereby denied."

C. The Finding That Appellee Left a Position in the Employ of the Appellant Was Abundantly Supported by the Evidence and Was Required by a Construction of the Act to Effectuate Its Remedial Purpose.

(1) The Act Was Never Intended Only to Protect Veterans on Regular Payrolls.

The trial court decided that Sanger, at the time he entered the service, held "a position in the employ" of the defendant within the meaning of the Selective Service Act of 1940 [R. 221]. Referring to the words of the statute "position in the employ of any employer," the trial court said:

> "That is a phrase of indefinite content, but I am of the opinion that it is broad enough to cover the plaintiff, and so hold."

In *Kay v. General Cable Corporation* (3 Cir. 1944), 144 F. 2d 653, 654, the Court said:

> "The question here presented, therefore, is not to be solved by the application of abstract tests or formulae; but the factors which usually determine the nature of a disputed relationship must be considered *in the light of the purpose which Congress intended to accomplish.*"

Following that decision, this Court in *Brown v. Luster* (9 Cir., 1947), 165 F. 2d 181, 184, said:

> "This was carefully noted in the case of Kay v. General Cable Corporation, 3 Cir., 144 F. (2d) 653, 654: 'The status which the Statute protects is "a position * * * in the employ of" an employer—an expression evidently chosen with care. The word "employee" was not used. While it may be assumed that the expression which was adopted is roughly

synonymous with "employee," it unmistakably includes employees in superior positions and those whose services involve special skills, as well as ordinary laborers and mechanics. *Of course, the words are not applicable to independent contractors,* but, except for casual or temporary workers, who are expressly excluded, they cover almost every other kind of relationship in which one person renders regular and continuing service to another.'" (Emphasis supplied by the Court.)

Congress passed the Selective Service Act under its war power and under this power it imposed a new and special obligation upon all employers, as was pointed out by Judge Albert Lee Stephens in *Bochterle v. Albert Robbins, Inc.* (3 Cir., 1947), 165 F. 2d 942, 943.

(2) The "Mischief-remedy" Rule Should Be Applied to Construction of the Selective Service Act.

"In many cases, most of which have been decided since *N. L. R. B. v. Hearst* (1944), 322 U. S. 111, courts have held that traditional common law tests or concepts of an employer-employee relationship . . . are not controlling in dealing with social legislation, and that under such legislation the area between employee and entrepreneurial enterprise is to be surveyed and determined in practical industrial and economic perspective and *with regard for the special remedial purpose of the legislation.*" (*Walling v. McKay* (D. Neb., 1946), 70 Fed. Supp. 160, 170.)

In the *Hearst* case, Mr. Justice Rutledge noted the fact that

"myriad forms of service relationships, with infinite and subtle variations in the terms of employment, blanket the nation's economy." (P. 126.)

In that case Mr. Justice Rutledge applied the test which has subsequently become known as the "mischief-remedy test." (See 32 Cal. Law Rev. 293, 15 Univ. of Chicago Law Rev. 647.)

Referring to the Wagner Act, Mr. Justice Rutledge said in the *Hearst* case:

> "The mischief at which the act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" (P. 126.)

Congress has made the task of the courts in construing the Selective Service Act much easier than it did in the case of the Wagner Act, Social Security Act or the Fair Labor Standards Act. Here, in providing a remedy for the returning veteran, the Court is not required to determine whether or not he was an "employee." Rather, the Court is merely required to determine whether the veteran "left . . . a position, other than a temporary position, in the employ of any employer." The "mischief" at which the Selective Service Act was aimed was to assure the person leaving for war that his position was to be kept open for him upon his return. Congress did not confine its assurance to those veterans who happened to be on regular payrolls, drawing daily, weekly or monthly wages. Congress recognized that it was as important to guarantee the postwar security of a veteran, no matter where he fitted into the "myriad forms of service relationships." It recognized, as Mr. Justice Rutledge said in the *Hearst* case, that "economic relationships cannot be fitted neatly into the containers designated 'employer' and 'employee' which an earlier law had shaped for different purposes" (p. 128).

Consequently Congress in drafting the Selective Service Act deliberately declined to use the word "employee" and instead chose the word "position."

As a consequence of this wise selection of language, the courts have repeatedly extended the relief of the Selective Service Act to veterans who left positions where they were not employees in the old common law sense of the term.

King v. Southwestern Greyhound (10 Cir. 1948), 169 F. 2d 497; cert. den. 345 U. S. 891;

Loeb v. Kivo (2 Cir. 1948), 169 F. 2d 346; cert. den. 345 U. S. 891;

Schwetzler v. Midwest Dairy Products Corp. (7 Cir. 1949), 172 F. 2d 612;

Levine v. Berman (7 Cir. 1947), 161 F. 2d 386; cert. den. 332 U. S. 792;

Allyn v. Abad (3 Cir. 1948), 167 F. 2d 901;

Lee v. Remington Rand (S. D. Cal. 1946), 68 F. Supp. 837;

Salter v. Becker Roofing Co. (M. D. Ala. 1946), 65 Fed. Supp. 633;

Martin v. Doan (D. Mass. 1947), 68 Fed. Supp. 783;

Whitver v. Aalfs-Baker Mfg. Co. (N. D. Iowa 1946), 67 Fed. Supp. 524;

Trusteed Funds, Inc. v. Dacey (1 Cir. 1947), 160 F. 2d 413;

MacMillan v. Montecito Country Club (S. D. Calif. 1946), 65 Fed. Supp. 240;

Dodds v. Williams (9 Cir. 1947), 163 F. 2d 724;

O'Connor v. Yardley (E. D. Pa. 1947), 16 C. C. H. Labor Cases 74,858, aff'd. 3 Cir. 1948, 171 F. 2d 40.

(3) The Finding That Sanger Was Not an Independent Contractor Was Abundantly Supported by the Evidence and Should Be Upheld Under 52 A. of F. R. C. P.

Appellant attempts to disqualify Sanger from the protection of the Selective Service Act by classifying him as an independent contractor. On this point, appellant cites three cases. Two of them, *Rosenbaum v. Ceco Steel Products* (D. D. C. 1947), 84 Fed. Supp. 954, and *Frank v. Tru-Vue, Inc.* (S. D. Ill. 1946), 65 Fed. Supp. 220, are distinguished by the appellant's brief itself since at pages 51, 52, Appellant's Opening Brief, appellant points out that in these two particular cases the position formerly held by the veteran was no longer in existence when he applied for reinstatement. In the third case, *Brown v. Luster* (9 Cir. 1947), 165 F. 2d 81, the trial court had found upon the particular facts before it that the veteran was an independent contractor. This Court merely held that *that* judgment was based on and supported by competent evidence and was not contrary to law, just as it did in *Dodds v. Williams,* 165 F. 2d 724, when it upheld a District Court finding that the veteran was not an independent contractor. In the *Dodds* case, this Court cited with approval the *MacMillan* and *Lee v. Remington Rand* decisions, *supra.*

As the Court said in *Allyn v. Abad, supra:*

> "On the basis of the printed record, we are inclined to believe that the weight of evidence may have warranted a contrary finding. We are aware, however, that the trial judge had the opportunity to observe the witnesses and evaluate their credibility, and in Van Doren v. Van Doren Laundry Service, 3 Cir. 1947, 162 F. 2d 1007, at page 1009, we said, 'There being substantial evidence to support the trial

court's finding on a closely contested question of fact, we are not disposed to weigh the evidence anew.' "

See Rule 52A of Federal Rules Civil Procedure.

Appellee submits that there was abundant evidence in this case to support the trial court's conclusion [I. R. 17] that Sanger left a position in the employ of the defendant and was not an independent contractor (see pars. 1, 2, 3 and 4 of appellee's statement of the case, p. 2, this brief).

When Sanger went to war, Plomb paid him honor for his patriotism (par. 6, appellee's statement of the case, p. 7, this brief). Similar treatment of another veteran led District Judge Harrison, in *Lee v. Remington Rand, supra,* to make the following observation at page 839:

"As a display of patriotism of its organization, respondent had the name of petitioner displayed, along with other employees, on an honor roll in its Los Angeles branch office. This honor roll designated the petitioner as an 'employee.' This discloses his status as considered by respondent while waving the flag.

Unfortunately, respondent failed to exemplify the same degree of patriotism as its employees, and now refuses to restore petitioner to his former position or status with the respondent and is seeking to avoid doing so on strictly technical grounds. Patriotism of the employees was deemed commendable and subject to laudation by the respondent but hollow in its meaning insofar as the respondent was concerned."

In the *King v. Southwestern Greyhound* case, *supra,* the Court said at page 499:

> "The contract specifically provided that the appellant was an independent contractor whose activities were limited to the consummation of the contemplated results, *but it is the effect of the contract* of the parties that controls their relationship, *not what they choose to call themselves.*"

King leased a bus station from the appellee bus lines. Under his contract he was required to pay all utility bills, provide waiting rooms, assume legal liability for claims arising from failure to maintain such facilities, and to be responsible and liable for all acts of his employees. He was compensated by a 10% commission on tickets and express services sold by him. King, like Sanger, had employees of his own, who assisted him in carrying out his duties for the bus line. However, the Court of Appeals for the Tenth Circuit had no difficulty in finding him not to be an independent contractor.

D. There Was No Change in Appellant's Circumstances and No Offer Was Ever Made Appellee of a Position of Like Seniority, Status and Pay.

Appellant would disqualify Sanger from the benefits of the Selective Service Act by arguing that its circumstances had so changed as to make it impossible or unreasonable to require it to reinstate a veteran. All of the force of appellant's argument on this score (App. Op. Br. 51-64) evaporates when it appears from the facts (pars. 5 and 10-B, appellee's statement of the case, p. 13, this brief) that appellant did not find it "impossible or unreasonable" to maintain the stay-at-home sales-

man, Schrenker, until January 1, 1947, on the identical basis on which Schrenker and Sanger were employed before Sanger went into the service.

The appellant concedes (App. Op. Br. 20) that the returning veteran is guaranteed the rights "enjoyed by contemporary employees who had attained at least equal seniority."

The trial court reached the conclusion [III. R. 18] that the defendant wrongfully refused to offer to restore plaintiff to a position of like seniority, status and pay, equivalent to that left by plaintiff to enter the naval service. The facts supporting this conclusion are abundant (see par. 10, appellee's statement of the case, p. 11, this brief).

Sanger denied that any offer had been made him of an alternative territory in Chicago [R. 215] and it was conceded that the Kansas City territory claimed to have been offered him had been "whittled off" (App. Op. Br. 71).

Appellant chooses to sneer (App. Op. Br. 59) at Sanger's good faith "in stating that he wanted at least a year in which to give up his other lines." Appellee submits that Sanger, throughout, took a principled position and that it is certainly not a lack of good faith for a veteran to want to rely upon the promise of reinstatement that Congress gave him, to want to be treated the same as Schrenker, the stay-at-home veteran, and to be loyal to those other manufacturers who had paid him commissions during the war when Plomb had not.

(1) Plomb's Post-war Profits Were Not a Lawful "Change of Circumstance."

While it is probably true that Plomb did not need a salesman of Sanger's caliber during the lush post-war year of 1946, that is not the kind of changed circumstance which Congress had in mind.

In *Levine v. Berman* (C. A. 7), 161 F. 2d 386, cert. den. 332 U. S. 792, Justice Minton said at page 388:

> "No change of conditions had made this unreasonable or impossible. While the petitioner was in service doing his bit to win the war, the respondent's business had prospered so greatly that it could not supply all the rugs it received orders for. When the petitioner returned from service with an honorable discharge and his service, with that of other men, had won a war that made it possible for the respondent to prosper so abundantly, we do not see on this record how it would have been unreasonable or impossible for the respondent to restore the petitioner at his old commission. That is what he was receiving when he left. Some of the respondent's salesmen were receiving the same commission when he returned and applied to be restored and for some time thereafter. *The record does not reveal what the petitioner might have earned if allowed his old territory with his allotment at his old commission of ten per cent.* We cannot therefore say that it would be unreasonable, and certainly not impossible, to restore the petitioner to his territory under allotment at his old commission. *We cannot say it is unreasonable unless we are to say that the returning servicemen shall not share in the abundant prosperity when he returns.* We are not prepared to go that far. Indeed, the tenor and purpose of the Act guide us in a different direction."

An additional citation on this point is *Loeb v. Kivo* (2d Cir.), 169 F. 2d 346, cert. den. 345 U. S. 891.

Loeb was a commission salesman who was informed upon his return from the war that in his absence a buyer's market had been converted into a seller's market and that salesmen were no longer necessary. The Court said, at page 349:

> "An increase in business with the resultant change in method of sales as here took place offers no justification, we believe, for defendant's action. * * * To an outsider the conditions of the business would appear the same except for the obvious advantages resulting from wartime prosperity and the universal experience of the need to turn away, rather than to solicit, business during this period. This situation would seem peculiarly the case for the application of the remedial functions of the act. The findings show that this is not the case of requiring the creation of a useless position for the veteran but the granting of some equality of treatment with the stay-at-home employee who had originally been his junior."

The plaintiff in the *Loeb* case was awarded damages measured by what had been earned by the salesman who replaced him, less whatever he earned on his own during that time, the Court saying, at page 351:

> "The fact that plaintiff's 1946 earnings thus became greatly increased over his 1942 earnings does not matter, since he was entitled to share in the war-fostered prosperity of the firm."

(2) The Offer of a Changed Territory Was Not Comparable to Sanger's Pre-war Territory.

In *Schwetzler v. Midwest Dairy Products Corp.* (7 Cir. 1949), 174 F. 2d 612, 613, the Court said:

> "In Levine v. Berman, 7 Cir., 161 F. 2d 386, we held that the returning veteran was entitled to restoration of his original position because he had had an *exclusive territory* and that the position offered in its place did not offer comparable opportunities. To the same effect is Loeb v. Kivo, 2 Cir., 169 F. 2d 346. See also Allyn v. Abad, 3 Cir., 157 F. 2d 901. Cf. Salter v. Becker Roofing Co., D. C., 65 F. Supp. 633, where the court held that a branch manager was entitled to restoration to the same branch rather than a new one in a different city which would have involved his moving his home and opening up an entirely new territory; and Whitver v. Aalfs-Baker Mfg. Co., D. C. 67 F. Supp. 524, where the court held that a salesman was entitled to restoration of his *original territory which he had himself built* up when the territory offered in its place and rejected by him was greatly inferior in opportunities for earnings."

Mr. Justice Minton in *Levine v. Berman* (7 Cir. 1947), 161 F. 2d 386, 388, said:

> "The petitioner had worked in his old territory in less lush days. Presumably he had friends and customers in his territory, and he was entitled to the benefit of his acquaintance and knowledge of this territory. When he returned he found other salesmen in his territory. *There is no showing that it was impossible or unreasonable to remove one or all of these salesmen from the petitioner's old territory, and to restore the territory to him.*"

Appellant's argument here was presented by another litigant in *Mihelich v. F. W. Woolworth Co.* (D. C. D. Idaho, N. D. 1946), 69 Fed. Supp. 497, 498, 499, and the Court had this to say:

> "There is evidence, and the defendant has set forth as its reason for denying this petitioner his old position, that they have moved their store from one location to another in the same city and that the old store is not in existence, where this petitioner worked; *that the new store* is physically larger in size than the old one, *requires more help, handles a greater quantity of merchandise and does more business.*
>
> "I might use the term 'what irony'—*no man would be able to go back to his job on returning from service if this was a defense.* It may be possible to read this defense into the law—that the employer's circumstances are so changed as to make it unreasonable to employ this petitioner, but this Court will not so interpret it under the facts in this case. What caused this defendant to move into larger quarters; what caused it to increase and enlarge its stock? No one will dispute that it was caused by the war which this petitioner was helping to win—and the Court is of the opinion that it didn't grow to such an extent that this petitioner could not successfully manage it, because the manager who was here taking this man's place while he was in the armed forces simply walked over to the new store and continued as manager of the new and enlarged store. Were it not for this man and others like him this business might not have had the opportunity to grow. This store might have been reduced by bombs to a mass of rubble. This might be stretching our imagination, but the situation was such that this man and millions of others like him were called to the Service to help

protect our country; to protect you and me and the man who replaced him as manager while we were all safely at home.

"While this store was adding more and more to its profits, this petitioner, who, it is admitted, has served the defendant faithfully and well for years, was reduced to the rank and to the salary of an ordinary soldier. He didn't go in as an officer, but as a private in the ranks. It wasn't a question of salary with him—it wasn't a question of profits—he offered his life if necessary to protect you and me. When the petitioner left to serve with the armed forces he was commended by his employer, the defendant here. I don't care to indulge in any patriotic address, I only want to mention a few facts. It has always been the practice in this Country to commend those who left to serve their country in an emergency such as we recently went through; there is always flag waving, cheering, hand shaking, addresses and bands playing. What about the return? That is practically unnoticed. Certainly this petitioner has been penalized severely from a financial standpoint; he not only lost those years when he could have been making money, but he lost his position. He was promised by the Government that this would not happen to him if he survived this conflict.

"The serious question here is whether the defendant met the technical requirement of the Statute. That is, was the petitioner restored to such position, or to a position of like seniority and pay when he was assigned to the store at Astoria. I think not.

"There was a provision in his contract that would indicate that the Company had a right to do this, even though the position was not located in as pleasant surroundings, but I feel that the provisions of

the Selective Service Statute did not contemplate that any clause in a contract of employment would be construed to place the service man in a worse position than he was prior to his induction into the Service, and it would seem that this petitioner was placed in a poorer situation. The evidence is very unsatisfactory in that regard, but at least we have evidence that the petitioner would have made less money at the store at Astoria."

E. Failure to Restore the Veteran Is a Continuing Violation for Which the Proper Remedy Is Restoration, With Damages Running, Without Limitation, Up to the Time of Restoration.

The judgment in this case falls considerably short of the allowable maximum. The appellee was denied any damages for loss of commissions in the years 1947, 1948, 1949 and 1950. Furthermore, the Court ordered him restored as of 1951 on a reduced territory and at reduced commissions. However, since this action of the Court was probably justified by the Court's equitable discretionary power to control the amount of damages, the appellee filed no cross-appeal.

(1) Right to Compensation Runs From Date of Application for Reemployment.

What the Court did award appellee was incidental damages as well as one year's reinstatement. Appellant concedes that Courts have consistently done this (App. Op. Br. 20, 69), but insists that this Court should have limited the damages to those accruing after September 22, 1949, when the action was filed. Such a contention has been squarely held not to be the law.

In *Coon v. Liebmann Breweries* (D. N. J., 1949), 86 Fed. Supp. 333, 335, the Court said:

> "It is the contention of the respondent that the petitioner is not entitled to recover compensation for the loss of wages suffered prior to the institution of this action on September 11, 1947. There are cases which support this contention. Dacey v. Bethlehem Steel Co., D. C., 66 F. Supp. 161, 163; Thompson v. Chesapeake & Ohio Ry. Co., D. C., 76 F. Supp. 304, 308; Anglin v. Chesapeake & Ohio Ry. Co., D. C., 77 F. Supp. 359, 363. These decisions create limitations which are neither prescribed by the Act nor contemplated by its express provisions.
>
> "This Act, like the Selective Training and Service Act, 50 U. S. C. A. Appendix, Sec. 301, *et seq.*, is remedial legislation which must be 'liberally construed for the benefit of those who left private life to serve their country in its hour of great need.' See Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 285, 66 S. Ct. 1105, 1111, 90 L. Ed. 1230, 167 A. L. R. 110. It is our opinion that this rule of construction necessarily prohibits the court's reading into the Act conditions or limitations which are not therein expressed."

Other cases holding that compensation for failure to reemploy runs from the date of application for reemployment are:

Allyn v. Abad (Cir. 3, 1948), 167 F. 2d 901;

Anderson v. Schouweiler (D. Idaho, 1945), 63 Fed. Supp. 802;

Van Doren v. Van Doren Laundry (Cir. 3, 1947), 162 F. 2d 1027;

Dacey v. Trusteed Funds, Inc. (D. Mass., 1946), 66 Fed. Supp. 321;

Hayes v. Boston & M. R. Co. (D. Mass., 1946), 66 Fed. Supp. 371;

Bentubo v. Boston & M. R. Co. (D. Mass., 1946), 66 Fed. Supp. 910;

MacMillan v. Montecito Country Club (S. D. Calif., 1946), 65 Fed. Supp. 240.

Furthermore, District Courts of the United States have initially ordered restoration years after the cause of action arose.

Delaney v. Special Service Co., Inc., 76 Fed. Supp. 414 (E. D. La., 1948) (two years);

Byrd v. North American Aviation, Inc. (S. D. Calif., 1948, 15 Labor Cases, 73,929) (22 months);

Thompson v. Chesapeake & Ohio Ry. Co., 76 Fed. Supp. 304 (S. D. W. Va., 1948);

O'Connor v. Yardley Gold Club (E. D. Pa., 1947) (two years), affirmed a year later, 171 F. 2d 40 (C. A. 3, 1948).

(2) The Damages Awarded Appellee Fall Far Short of the Maximum That Could Have Been Awarded.

In addition, appellant complains about the amount of damages awarded because they were computed on the veteran's old commission basis; on all of his old territory, and without deduction for his earnings from other lines. (App. Op. Br. 68-75.)

But anything short of this allowance would not have constituted the full measure of damages for failure to restore the veteran to a position of "like seniority, status and pay." As previously stated, the judgment actually deprived appellee of a really large sum of money had he

been compensated for all of the time Plomb wrongfully refused to rehire him. In addition the Court required Sanger to credit Plomb with $34,043.45 to pay the 1946 commissions to the additional salesmen which Plomb had installed in his old territory during the war [R. 16]. The short answer to Plomb's complaint that the Court permitted Sanger to retain his earnings from other lines without deduction (App. Op. Br. 72) is that it is exactly what it was permitting itself in regard to the stay-at-home salesman Schrenker (Par. 10 B, Appellee's Fact Statement, p. 13, this brief).

Section 308(e) of Title 50 App. U. S. C. A. contemplates compensation to the veteran for "any loss of wages or benefits suffered by reason of such employer's unlawful action."

As will hereinafter be shown, District Courts have literally interpreted this section and allowed damages to the veteran from the date of his request for reinstatement to the date of his reemployment, because, until the veteran is reemployed, the employer has continuously acted unlawfully.

It is true that early decisions by some courts assumed a one-year limit on the duration of all statutory rights, because of the limit as to protection against discharge; *Cf. Mihelich v. Woolworth,* 69 Fed. Supp. 497 (D. Idaho, 1946), in which a court questioned the value of ordering restoration 11 months after the employer refused to restore, since it would be for only one month. Some courts concluded that their jurisdiction was taken away one year after the veteran was restored to his position: *Azzerone v. W. B. Coon Co.,* 73 Fed. Supp. 869 (W. D. N. Y., 1947). Today the Supreme Court has decided that the protection of the statutes continues indefinitely, except

as to immunity from discharge without cause. The jurisdiction of the courts continues, subject to Congressional withdrawal. The Supreme Court in *Aeronautical Lodge v. Campbell,* 337 U. S. 521 (1949), ruled that the veteran's rights are continuously affected by the flow of collective bargaining does not discriminate against him as a veteran. The decision in *Oakley v. Louisville & N. R. Co.,* 338 U. S. 278 (1949), rules that along with this, the protection against discrimination continues, to last as long as the employment does. This protection is not confined to any one-year period. There is now, therefore, no justification for limiting damages to a one-year period where they are proved to have outlasted that period.

In the following cases, courts have awarded damages *for periods exceeding one year.* This includes cases in which damages were cut because of laches:

Parker v. Maynard Boyce (S. D. Cal., 1946), 74 Fed. Supp. 581;

Delaney v. Special Service Co., Inc., 76 Fed. Supp. 414 (E. D. La., 1948) (damages to date of past proper offer of restoration);

Thompson v. Chesapeake & Ohio R. Co., 76 Fed. Supp. 304 (S. D. W. Va., 1948);

Byrd v. North American Aviation, Inc. (S. D. Calif. 1948), 15 Labor Cases, 73,920 (damages until restoration in accordance with court's order, decision two years after violation);

Nobel v. International Nickel Co., Inc., 77 Fed. Supp. 352 (S. D. W. Va., 1948) (same basis as in *Byrd*);

Martin v. John S. Doane Co., 68 Fed. Supp. 783 (D. Mass., 1947) (damages to date of judgment more than year after violation) reversed on other grounds;

and possibly

> *O'Connor v. Yardley Golf Club.,* 79 Fed. Supp. 264, affirmed, 171 F. 2d 40 (C. A. 3, 1948), if damages awarded represent fees for two seasons.

In *Sunker v. Local No. 621* (E. D. Tenn., 1949), unreported, the theory was correctly stated. As to an annual elective position the court ordered reinstatement for one year and awarded the one year's damages claimed by the veteran. The court said that a year's wages might there be the nearest equivalent to reemployment but do not suffice where a veteran desires reinstatement, since the assumption that the position would not have lasted beyond a year cannot properly be made.

> *"Compensation for a veteran's loss of wages for a year is not, in every instance, adequate redress for a deprivation of his rightful job,* especially if that also involves deprivation of seniority. In the case of the petitioner, the facts show, and the Court finds, that if he had been restored to his rightful place of employment in good faith on June 3, 1946, he would still be holding that place or a better one now with accumulated standing, tending to forecast continued future employment for an indefinitely long period. He was entitled to all that. *To dispose of his complaint with a mere award of lost wages for one year,* or some lesser sum, or merely to reinstate him now with no compensation for his admittedly large interim financial loss, *would be manifestly inadequate redress for the deliberate wrong done him by the company.* The Congress intended that a veteran should be put as nearly as practical in the same position he would have enjoyed if he had not gone to war; and in this case, that purpose cannot be served without reinstatement to proper employment, together with com-

pensation for his interim loss of wages to date. On that basis only, can he be made whole." (*Byrd v. North American Aviation,* 15 Labor Cases, 73,927.)

There are other decisions in which the reinstatement ordered plus damages covered more than a year (or, after discharge without cause, more than the balance of a one-year period from the initial reemployment). Among these are:

Gockel v. Valley Publishing Co. (S. D. Calif., 1947, unreported);

Grone v. Congregation, 72 Fed. Supp. 544 (W. D. Ky., 1947), reversed on other grounds;

Hoyer v. United Dressed Beef Co., Inc., 67 F. Supp. 730 (S. D. Calif., 1946);

Gauweiler v. Elastic Stop Nut Corp., 69 Fed. Supp. 294, reversed on other grounds;

DiMaggio v. Same, 162 F. 2d 448 (C. A. 3, 1947);

O'Connor v. Yardley Golf Club, 79 Fed. Supp. 264, affirmed, 171 F. 2d 40 (C. A. 3, 1949).

Appellant declares that the trial court was in error in awarding damages for the year 1946, "a period so chronologically separated from the time of reinstatement" that the damages lose their "incidental" character. (App. Op. Br. 68.) No authority is cited by appellant for this proposition.

However, it is apparent that the court selected 1946 because throughout that entire year Plomb continued to

employ Shrenker, the salesman who stayed home, on the pre-war basis that Sanger had; to wit: with permission to augment Plomb income with commissions from other lines. After 1946, this privilege was no longer extended to Shrenker.

Thus when the Court order Sanger reinstated as of 1951, the Court logically confined Sanger's income to the same basis that Shrenker had as of 1951.

But the real damages suffered by Sanger was the loss of 1946, the "cream year" of all. That was the year of Plomb's greatest sales in the Midwest territory. Even though the court may have denied Sanger damages for subsequent years under its equitable power to exercise discretion as to damages (*Bentubo v. Boston & Maine R. R. Co.* (Cir. 1, 1947), 160 F. 2d 326), it could not, in good conscience, and did not, in fact, deny him full recovery for 1946.

On the matter of Shrenker's commissions in 1946, Exhibit 345 [R. 140] states that he was permitted to continue "on the old basis" and it is established that he employed two assistants. However, even if it be conceded, *arguendo,* that his commissions were on a new basis, the court properly awarded the old commission rate to Sanger for 1946 in view of the fact that otherwise the court's decree relieved Plomb of paying Sanger any commissions for the years 1947, 1948, 1949, and 1950.

If it was in the Court's power to award much greater incidental damages, it is hardly for the appellant to complain that the Court granted less.

F. Findings of Fact Should Not Be Set Aside Unless Clearly Erroneous.

This case involved essentially the decision of questions of fact, upon which the trial court made careful and definite findings.

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (Rule 52(a), F. R. C. P.)
>
> Manual of Federal Appellate Procedure, O'Brien (3rd Ed., San Francisco, 1941), pages 19-20;
>
> *Timken v. U. S.* (No. 352, Oct. Term, 1950), decided June 4, 1951, 95 L. Ed. Adv. Op. 813, 816;
>
> *Grace Bros. v. Commr.* (9 Cir. 1949), 173 F. 2d 170, 173, 174.

Conclusion.

This case does not present any new situation. It is just the old story of a veteran being welcomed with legalisms instead of garlands.

The case boils down to the fact that Plomb allowed the recommendations of an outside efficiency expert to outweigh the ordinary humanities that the situation called for. While Sanger was away helping to win the war, he had lost the battle to the efficiency experts out at Plomb. Sanger, who had received nothing from Plomb during the war except favorable notices in the house organ, also received nothing from Plomb after the war.

Fortunately, however, the law supplies a kind of compulsory human decency that always overrules the ef-

ficiency experts. Certainly this case is one that called for a truly remedial application of the Selective Service Act. That was what the trial court did.

This is a significant case. We are engaged in another mobilization. Employers may again be writing letters to their government urging that more salesmen be given commissions in the Navy so that they can stop *paying* them commissions themselves. (Salesmen aren't needed in wartime.) This case will indicate whether such salesmen are going to have their welcome by the boss guaranteed on their return or whether they must fear getting the kind of cold, aloof brush-off that Plomb gave Sanger.

In its essence the case is simply this: Is the veteran to be greeted with open arms, or at arm's length? Which is to prevail—the spirit of the Selective Service Act or the recommendations of an efficiency expert?

It is in this Court's power to give the answer. Appellee is confident that it will be the correct one.

The judgment should be affirmed.

Respectfully submitted,

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